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May 22, 2017

By ECF

The Honorable Alison J. Nathan
United States District Judge
Southern District of New York
40 Foley Square
New York, New York 10007

Re: *United States v. Benjamin Wey, et al.*, 15-CR-0611 (AJN)

Dear Judge Nathan:

We represent defendant Benjamin Wey and write to respond to the Government's May 18, 2017 letter providing the Court with the recent decision in *In re: 650 Fifth Avenue and Related Properties*, 08 Civ. 10934 (KBF) ("*650 Fifth Ave.*"), in which Southern District Judge Katherine Forrest denied a motion by the Alavi Foundation ("Alavi") to suppress the fruits of the Government's unconstitutional search on "good faith" grounds. For many reasons, Judge Forrest's decision in *650 Fifth Ave.* does not alter the conclusion in this case that the unconstitutional searches of Mr. Wey's office, home and computer devices cannot be saved.

First, the facts of *650 Fifth Ave.* differ from those in the case at bar in myriad ways -- too many to fully recount in this letter. Nevertheless, Judge Forrest herself highlighted some key differences when she referred approvingly to the decisions in *United States v. Zemylansky*, 945 F.Supp.2d 438 (S.D.N.Y. 2013) and *United States v. Ganias*, 755 F.3d 125, 136 (2d Cir. 2014). For example (and as the Government acknowledged in its May 18 letter to Your Honor), Judge Forrest distinguished *Zemylansky* from the case before her on the grounds that in *650 Fifth Ave.*, "the agents on site here knew what they were looking for and, importantly, why." *650 Fifth Ave.*, at 53 n.34. By contrast in Mr. Wey's case, the Government offered *no testimony* from the agents who seized the vast majority of the materials about what they understood about the investigation, or what they had read or were told about the investigation in advance of the searches. Moreover, the witnesses who *did* testify were unable to articulate any coherent thread of what they understood the written warrants permitted them to seize, demonstrating that the scope of the searches was both infinitely expansive and undefined, and left entirely up to their discretion. (*E.g.,* former-AUSA Massey testified that a heroin baggie and a prescription receipt for Mr. Wey's nephew would be within the scope of the warrant; Agent Komar averred that a prescription would not be within the warrant's scope; AUSA Ferrara argued that the Government could search the electronic documents for anything, including for pornography, and words like "brick, dope, kilo," even three years after the search was executed).

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Moreover, Judge Forrest's decision appears to have been driven significantly by her views that (a) although the Second Circuit had already reversed her earlier conclusion in that case that the search warrant at issue did not violate the Fourth Amendment's particularity requirement, *see In re 650 Fifth Avenue*, 830 F.3d 66, 100 (2d Cir. 2016), its facial infirmities were of a technical nature that were not corrected due to "urgency" and a "need for expeditiousness," *650 Fifth Ave.*, at 22 and n.14, 67-68[1], and (b) the evidence Alavi sought to suppress was already produced by the movant in separate civil actions, and was otherwise subject to a variety of "inevitable discovery" arguments (also not present in this case).

With regard to the electronic searches, Judge Forrest's ruling merely confirms the defense's position in this case – that when the FBI conducts additional searches through electronic materials years after their seizure, that raises serious Fourth Amendment concerns. *650 Fifth Ave.*, at 51. (This issue was apparently not raised by the facts in *650 Fifth Avenue*.)

Finally, Judge Forrest's decision is not binding precedent on this Court, and there are significant reasons to doubt the persuasive authority of that decision. The decision appears to apply the wrong legal standard in endorsing the Government's assertion that the agent's "good faith" should override the unconstitutionality of its warrants: it suggests that "good faith" exists unless the Government has been shown to have engaged in "intentional misconduct or deliberate action to violate the law," or acted in a "deliberate, reckless, or grossly negligent manner." (*See 650 Fifth Ave.,* at 67, 73) Indeed, the Court goes so far as to suggest that any conduct is "good faith" as long as it follows "typical practices" (*650 Fifth Ave.,* at 22, 69). By the reasoning of *650 Fifth Ave.*, this Court could never put a halt to unconstitutional practices as long as they have been the customary practice. This is simply not the law. While *650 Fifth Ave.* largely avoids the controlling Second Circuit precedent on good faith, it is well-settled that the Government cannot rely on the good faith exception when executing warrants that are as facially deficient as the warrants of the NYGG office and Mr. Wey's home.[2] *See, e.g., United States v. George*, 975 F.2d 72, 77-78 (2d Cir. 1992); *United States v. Buck*, 813 F.2d 588, 593 n.2 (2d Cir. 1987); *United States v. Zemlyansky*, 945 F. Supp. 2d 438, 454, 457 (S.D.N.Y. 2013); *United States v. Cioffi*, 668 F. Supp. 2d 385, 392 (E.D.N.Y. 2009); *United States v. Vilar*, 05-CR-621, 2007 U.S. Dist. LEXIS 26993, at *76-77 (S.D.N.Y. Apr. 5, 2007).

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1 In this case, the warrant paperwork was formulated weeks (if not months) prior to the searches, with no exigency. (Doc. No. 94, p. 7).

2 Unlike the warrants in *650 Fifth Ave.*, the deficiencies of the warrants at issue in this matter go far beyond mere failure to list the statutes under investigation and provide a time frame. Here, the warrants failed at every level: they covered *all* documents related to the very owner-occupants of both locations searched; they broadly described a virtually limitless universe of materials that could be seized; *and* they failed to specify a time frame and failed to identify the crimes under investigation.

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Similarly, in concluding the Government acted in "good faith," Judge Forrest improperly focused on the agents' familiarity with the scope of *the investigation,* rather than their understanding of the proper scope of *the search warrant, i.e.*, the document setting forth what the Government had established probable cause to seize. (*650 Fifth Ave.,* at 32, 34, 70). The Constitution mandates that agents may only seize items supported by probable cause and described with particularity in the warrant. Under no interpretation of the Constitution are agents permitted to seize *anything relevant to their investigation* just because they have obtained a search warrant to seize specified items. The Fourth Amendment is clear: it precludes leaving searching agents to their own unfettered discretion. Judge Forrest appears to adopt a view that agents guided by nothing more than an unparticularized general warrant, a general understanding of the investigation, and their own good intentions can legally seize whatever they believe is appropriate. The view espoused in *650 Fifth Ave.* has been roundly rejected repeatedly by the courts, including *Buck*, *George*, *Zemylansky*, and additional precedent cited in Mr. Wey's suppression papers.

For the foregoing reasons, we submit that *650 Fifth Avenue* has no impact on the conclusion that the fruits of the unconstitutional searches of Mr. Wey's home and office should be suppressed.

Respectfully submitted,

David Siegal